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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, ET AL., PETITIONERS,

vs.

BARNSDALL REFINERIES, INC., THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

PETITION FOR CERTIORARI FILED JUNE 8, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

INDEX.

	Original	Print
Proceedings in Supreme Court of Oklahoma	1	1
Caption (omitted in printing)	1	
Application for leave to file petition for injunction	2	1
Order granting leave to file petition for injunction	6	4
Petition	8	4
Motion for order correcting title of defendants' answer	23	17
Order correcting title of defendants' answer	24	18
Answer of defendants	26	18
Opinion, Welch, J.	33	23
Order correcting opinion	40	29
Dissenting opinion, Osborn, J.	41	30
Petition for rehearing, etc.	45	33
Order denying petition for rehearing	50	37
Order substituting parties defendant	51	38
Præcipe for transcript of record	52	38
Clerk's certificate (omitted in printing)	54	
Order allowing certiorari		40

[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 25181

BARNSDALL REFINERIES, INC., et al., Applicants,

versus

OKLAHOMA TAX COMMISSION, MELVIN CORNISH, JOHN T. BAILEY, and W. D. Humphrey, as Chairman and Members of said Commission, and R. B. Connor, as Sheriff of Osage County, Oklahoma, Defendants

APPLICATION FOR LEAVE TO FILE PETITION FOR INJUNCTION TO ENJOIN THE ENFORCEMENT AND COLLECTION OF AN ILLEGAL STATE TAX—Filed Nov. 17, 1933

Come now the Applicants and apply to this Court for leave to file a petition for injunction to enjoin the enforcement and collection of an illegal tax made and levied for a State purpose and show to the Court that the reasons why this action is brought to this Court are as follow-:

1

The Oklahoma Legislature of 1933 passed an Act (Chapt. 132, Session Laws 1933), levying an excise tax of ⅛ of one per cent per barrel on each and every barrel of petroleum produced in the State of Oklahoma, which Act became effective April 10, 1933; that by its terms such Act applies to oil produced in Osage County, Oklahoma and the Applicants claim that such Act is invalid insofar as it applies to such oil production, because all oil produced in Osage County is produced by oil lessees as instrumentalities of the Federal Government in carrying out its obligations and duties to the Osage Tribe of Indians and members thereof, and such excise tax could only be valid as to such Osage Oil production in the event the Congress of the United States, by Act duly passed, had consented thereto and such consent has not been given. This action is sought to be brought in this Court pursuant to Sections 3781 to 3788

[fol. 3] inclusive, Revised Laws of Oklahoma, 1931. Such statutes provide among other things that

"The Supreme Court of this State shall have original jurisdiction of actions brought herein to enjoin the enforcement or collection of any illegal tax, charge or assessment made or levied for any State purpose and to enjoin the collection of any such tax if it shall be found by the Court that the same is illegal . . . ." (3781)

The excise tax which Applicants claim to be illegal, as applied to Osage production, is levied for a "State purpose" in that the money derived therefrom is by the terms of said Act to be expended in defraying the salaries and expenses of the officers and employees of the State of Oklahoma in the administration of the proration laws of the State of Oklahoma. The statutes referred to whereunder this action is brought to this Court seem to require this Court to take jurisdiction when a case falling within their scope is presented to it as any taxpayer affected by an illegal State tax is given the right to file a petition and it is then provided that summons shall be issued by the Clerk of the Supreme Court upon written præcipe filed by the plaintiff (3782).

2

The jurisdiction given by said statutes to this Court to enjoin the enforcement of illegal taxes levied for any State purpose is exclusively in this Court and cannot be exercised by any inferior court of this State; that the only remedy, if any, which a party would have in an inferior State court seeking to contest the validity of said excise tax as applied to Osage production would be to pay such tax under protest and bring suit to recover the same. This would require suits to be brought each month, as such excise tax is to be paid monthly and would result in each party from whom the tax was sought to be collected being required to bring many suits and there are a large number of parties affected by such excise tax. The amount of tax which any taxpayer would be required to pay as the excise tax accrued for one month would be small, and in many instances, the expenses of the litigation would be greater than the amount of the tax.

[fol. 4] 3

Under the statutes above referred to by reason whereof relief is sought in this Court, if this Court finds such excise tax to be illegal as applied to oil produced in Osage County, it is required to enjoin the collection of such tax as applied to Osage oil as to all parties affected, whether they be parties to this suit or not (3787). So that it will be greatly to the convenience of all parties affected by such excise tax, and to the representatives of the State, if this Court will exercise the jurisdiction imposed or attempted to be imposed upon it by said statutes, and in this one action determine so far as the courts of Oklahoma are concerned the validity or invalidity of said tax as applied to oil produced in Osage County.

4

The relief sought by the Applicants herein involves the exercise of a special remedy expressly created in the Supreme Court of Oklahoma, and nowhere else.

5

The question involved in the present case is one which ultimately this Court will be called upon to decide. Should an action be instituted in the District Court to test the validity of said excise tax as applied to Osage oil production, the losing party, whether the Oklahoma Tax Commission or the taxpayer, in all probability, would appeal and the question would ultimately come to this Court for final decision. The procedure through a District Court action would merely operate to delay a final decision by this Court and in the meantime each party desiring to contest the validity of such tax, as so applied, would be put to great and unnecessary expense in bringing the numerous suits necessary to contest the legality of such tax and the State would be put to great expense in defending the same, all of which can be avoided if this Court will take jurisdiction in this case.

[fol. 5] 6

Applicants further show that no controversy whatever over facts will be involved in this action, but there will be merely a question of law for determination.

Applicants move that if permission be granted for the filing of such petition that thereupon a temporary writ of injunction issue as prayed for in such petition.

Edward H. Chandler, James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Applicants.

[fols. 6 & 7] IN SUPREME COURT OF OKLAHOMA

ORDER GRANTING LEAVE TO FILE PETITION FOR INJUNCTION—November 21, 1933

The Clerk is hereby ordered to enter the following orders:

25,181—Barnsdall Refineries Inc. et al. v. Oklahoma Tax Commission, et al. Application for this court to assume original jurisdiction, sustained. Defendant ordered to file answer brief within 15 days from this date. Plaintiff to file reply brief within 5 days thereafter.

James B. Cullison, Vice Chief Justice.

[fol. 8] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION—Filed Nov. 21, 1933

Come now the plaintiffs above named, and leave of court having been first had and obtained file this their petition against the defendants, and each of them, and for cause of action say that L. R. Crawford and P. C. Spencer were duly appointed Receivers of Producers and Refiners Corporation on May 7, 1932 by the District Court of the United States for the District of Wyoming in the case of Consolidated Oil Corporation, Plaintiff, v. Producers and Refiners Corporation, in Equity No. 2217, and were duly appointed Ancillary Receivers of such corporation by the United States Court for the Northern District of Oklahoma on May 9, 1932, in the case of Consolidated Oil Corpora-

tion, Plaintiffs, v. Producers and Refiners Corporation, in Equity No. 743, and that such Receivers have been duly authorized by said United States District Court for the Northern District of Oklahoma to become parties plaintiffs to this action, and plaintiffs further say

[fol. 9] . 1. Each of the plaintiffs is a corporation duly organized and doing business in the State of Oklahoma under the laws thereof and the Oklahoma Tax Commission is a body or commission created by the laws of the State of Oklahoma having control of and the administration and execution of the tax laws of the State of Oklahoma and the collection of taxes under the hereinafter named Act, and that the defendants, Melvin Cornish, John T. Bailey and W. D. Humphrey are sole members of said Commission and R. B. Connor is the duly elected, qualified and acting Sheriff of Osage County, Oklahoma.

2. The Osage Tribe or Nation of Indians is a dependent tribe of Indians under the tutelage and guardianship of the United States and were so at and before all the times hereinafter named and as a place of residence for such Nation or Tribe of Indians the United States procured title to that body of land known as the Osage Reservation in the State of Oklahoma and which now composes Osage County in the State of Oklahoma, and on June 28, 1906, the United States by Act of Congress provided for the division of the lands and funds belonging to said tribe of Indians among the members of said tribe, said lands and funds to be divided in the manner and by the means in said Act of Congress set out and contained, but excepting from division, allotment or other disposition among the individual members of said tribe the oil, gas and other mineral content in or under said land, and reserving such mineral to the United States in trust for the use and benefit of said tribe, for division among them, or for disposition in such other manner as the United States might determine to be for the best interest of such tribe of Indians and ever since said 28th day of June, 1906, the title to said oil and gas and other mineral in the Osage Nation has been and remains in the United States as aforesaid. And under said Act of Congress and in accordance with its duties as a trustee of said oil, gas and other minerals it became, was and is the duty of the United States to see that said minerals were

produced from said land under rules and regulations prescribed by the Secretary of the Interior and to conserve and safeguard the rights of said tribe of Indians in and to [fol. 10] the said minerals and the proceeds derived from the production thereof until such time as the United States, in pursuance of the terms of said Act of June 28, 1906, and Acts of Congress amendatory thereto, finally disposes of said oil, gas and other minerals. And said Act expressly provides for the leasing of said lands for oil and gas mining purposes and provides that leases for such purposes are to be made by the Osage Tribe of Indians through its tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he might prescribe, and also provides that the royalties arising from said leases shall be paid and covered into the Treasury of the United States for the use and benefit of said tribe of Indians and when so paid into such Treasury, such royalties remain therein until paid out and disposed of in the manner provided by said Act of June 28, 1906, or to be provided by subsequent Acts amendatory to or taking the place of said Act of June 28, 1906, and under the laws of the United States now existing the mineral interest in the lands formerly composing the Osage Nation are unallotted and undivided and the title thereto remains in trust in the United States and the proceeds from the mineral interest therein are also held in trust by the United States to be disposed of in such manner as is or may be by law prescribed and the production of oil and gas and other minerals from said land under the laws of the United States is in performance of a function of government by the United States on and in behalf of its Indian wards and the lessee producing oil and gas therefrom is an agency or instrumentality of the government of the United States selected by the Government in the discharge of its duty and obligation to such Osage Tribe of Indians to see that the minerals under such land are produced in such manner as best calculated to advance and maintain the interest of said Indians.

3. That no oil is being or can be produced in said Osage County, except pursuant to an oil lease made by the Osage Nation through its Tribal Council, and approved by the Secretary of the Interior as by said Acts of Congress provided and the Rules and Regulations of the Secretary of

the Interior pertaining thereto; that each of said leases and such rules and regulations set out the manner in which oil and gas is to be produced, how the sale and disposal [fol. 11] of oil produced can be had and made, and how and under what conditions the oil produced from said leases can be run and delivered to the purchasers thereof and expressly provide that none of said oil can be sold, run or disposed of without the consent of the Superintendent of the Osage Indian Reservation shown by an Approved Division Order, and that said laws, leases, rules and regulations provide that the royalty reserved in each of said oil leases shall be paid to the Superintendent of such tribe at Pawhuska, Oklahoma, to be covered into the United States Treasury for the use and benefit of such Tribe of Indians or to deliver, at the election of the United States, a certain specified portion of the oil produced. That in the procurement, operation and development of said leases the plaintiffs and others have expended many millions of dollars and are now expending for operations large amounts of money and in all probability will continue to spend large amounts of money in the further development, operation and procurement of oil from said leased premises. That in the operation and development of said leases for oil and gas mining purposes the plaintiffs and each of them is acting as an agency or instrumentality of the United States in the discharge of the duty of the United States as to the production of oil in the interest and to the benefit of its said wards and as such is not subject to any control by the State of Oklahoma or any of the officers thereof and that said State and the officers thereof are without power, authority or warrant of law to exact a fee or tax by whatever name known or called on the privilege of the plaintiffs of producing or operating said leases or to levy or assess a tax on the production of oil from said leases as and when produced until and unless such oil becomes a part of the general property in the State of Oklahoma, except insofar as said tax may be authorized by an Act of Congress of the United States and the Congress of the United States, by the Act of March 3, 1921, expressly authorized the State of Oklahoma to levy and collect a gross production tax upon all oil and gas produced in said Osage Nation, such taxes to be in lieu of all other state and county taxes levied upon the production of oil and gas and each of the

plaintiffs subject to pay such gross production tax, in compliance with said provisions of such last Act, has since the [fol. 12] date of its approval, paid to the proper officers of the State of Oklahoma the gross production tax levied on the production of oil in Osage County and by reason thereof the State of Oklahoma is prohibited from levying other taxes upon such oil production of the plaintiffs. Such of the plaintiffs as own leases upon lands in Osage County, in procuring the same, procured and paid for them with the knowledge that the same, and the production of oil therefrom, was free from taxation by the State of Oklahoma except as in the manner hereinabove set out and by reason of said freedom from taxation they were induced to and did pay a greater amount for the acquisition of such leases than they would otherwise have done.

4. That each of the plaintiffs is affected by the Excise Tax Act on oil hereinafter referred to as applied to oil produced in Osage County; that each plaintiff is a producer of oil under one or more of said Osage oil leases, or a purchaser of oil produced in Osage County, or both a producer and purchaser of such oil; that the Oklahoma Legislature in 1933 passed an Act levying an excise tax on all petroleum produced in the State of Oklahoma, which Act was approved by the Governor of Oklahoma on the 10th day of April, 1933, and became in force and effect immediately after the approval thereof. By the terms of said Act, until June 30, 1935, there is levied an excise tax of 1/8 of 1¢ per barrel on each and every barrel of petroleum produced in the State of Oklahoma after the said 10th day of April, 1933, and such Act provides that said tax shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as provided by Chapter 66, Article 5 of the Session Laws of 1931 for the collection of the gross production tax on petroleum oil, and provides where such petroleum is sold at the time of production such excise tax shall be paid by the purchaser who is by said Act authorized to deduct in making settlement for such tax with the producer of said oil and the royalty owner of said oil, the amount of the tax so paid, and no provision is contained in said Act which exempts from its operation or from the tax therein levied and imposed, oil produced in the Osage Nation by persons acting as agencies of the United States

and as its instrumentalities in the production of said oil [fol. 13] for the use and benefit of said tribe, and where said oil is not sold at the time of its production but is retained by the producer, then it is provided that such excise tax shall be paid by the producer who, in turn, is authorized to deduct the pro rata amount of said tax in his settlements with the royalty owners for said oil and, where said oil is not sold, to deduct from the royalty oil an amount of royalty oil equivalent in value to the pro rata amount of the tax at the time the tax became due and paid. That said Act further provides that the tax thereby levied and imposed shall become payable on the 1st day of each calendar month on all petroleum oil produced in the State of Oklahoma during the preceding monthly period and if the tax is not paid on or before the end of the month the same becomes payable, the tax becomes delinquent and from such time, as a penalty, bears interest at the rate of 18 per cent per annum and it is provided in said Act that when any such tax is not paid the Oklahoma Tax Commission shall issue its warrant, directed to the Sheriff of any county in which the producer or purchaser has property, for the collection of the amount of said tax, interest and penalty, and the sheriff by such warrant is directed to proceed to levy upon the property, assets and effects of any such person (purchasing or producing oil and required to pay the tax so assessed and failing so to do), and to sell the same and make return thereof as upon execution, and such tax, interest and penalty under said Act constitutes and remains a lien upon the property, assets, and effects of such producer or purchaser required to pay the tax, until the same is paid. And in said Act it is further provided that if such producer or purchaser of oil, subject to such tax, fails to make report of the production and purchase or production without sale, or the computation of the tax levied by said Act within the time prescribed in such report, it is made the duty of the Oklahoma Tax Commission to examine the books, records and files of such purchaser or producer to ascertain the amount of oil produced or sold, or either, and to compute the taxes thereon, to which shall be added, when computed, the cost of such examination, together with any and all penalties accrued thereon. And it is further provided that any producer or purchaser who fails to file any sworn statement or report required by the provisions of

the Act in the manner and in the time in said Act pre-
[fol. 14] scribed, shall be liable to the penalty of $500.00 for each day of failure so to do, and such penalty is declared to be a lien upon all the property and assets of such producer or purchaser located in the State of Oklahoma. The plaintiffs and each of them have duly and regularly reported to the Oklahoma Tax Commission on account of all the oil produced or purchased where such substances were subject to the laws of the State of Oklahoma and has included in said report the amount of oil produced by them from leases in the Osage Nation and paid the amount of tax due under said Act, except plaintiffs have failed and refused, and now fail and refuse, to pay said tax so levied and imposed by said Act on the oil produced in the Osage Nation, and thereby have become, if said Act is valid as to oil produced in Osage County, subject to the penalty of 18 per cent as interest and, by reason of the failure in this regard to comply with the provisions of said Act have become apparently subject to such tax and penalty and therefore the State of Oklahoma is entitled to collect under the provisions of said Act, if the same be valid, said excise tax, with interest thereon at the rate of 18 per cent per annum until paid, and, if said Act is held to be valid as applied to the production of oil from leases in the Osage Nation, it constitutes a lien against all the property of any plaintiff failing to pay the tax, wherever the same may be located in the State of Oklahoma, and which lien can be enforced by the issuance of a tax warrant to the Sheriff of any County in the State of Oklahoma in which such plaintiff has any property, commanding such Sheriff to levy the same on the property of such plaintiff and proceed to sell the same in accordance with the terms of said Act which have been hereinbefore set out. The Oklahoma Tax Commission and the members thereof, being the body vested by said Act with the authority to enforce the same, construe and interpret said Act as valid as applied to the production of oil from leases in the Osage Nation and hold that said production is subject to the tax levied by said Act and must be paid in order to avoid the interest and penalties imposed by said Act and to relieve the property of plaintiffs from the liens declared and established thereon by such Act, and as so construed plaintiffs say that said Act is wholly void and of no force and effect in that, as so

[fol. 15] applied, it is in violation of the Constitution and laws of the United States in that it seeks to tax an agency or instrumentality of the Federal Government in the discharge of its official and trust duties to said Osage Tribe of Indians and attempts to levy a tax on the production of oil, the title of which is in the United States in trust as aforesaid, in violation of the express provision of the said Act of March 3, 1921, and that applying said Act to the oil produced in the Osage Nation, and in collecting said excise tax on the oil produced therefrom, the said Tax Commission and the other officers charged with the execution of said statute will be taking plaintiffs' property and depriving them thereof without due process of law and such taking will be a confiscation of the property of plaintiff for the use and benefit of the State of Oklahoma without compensation and without due process of law and therefore is and will be in violation of the Fourteenth Amendment to the Constitution of the United States. And said Tax Commission in so applying said Act to production and purchases of oil produced from oil leases in the Osage Nation is attempting to enforce as against plaintiffs, said Act, together with the penalties that may accrue by reason of non-compliance with the provisions of said Act and on the failure and refusal of plaintiffs to pay said excise tax on the ground and for the reasons hereinbefore set out, the Oklahoma Tax Commission has issued tax warrants against several of the plaintiffs directed to the defendant, R. B. Connor, as Sheriff of Osage County, Oklahoma, directing such Sheriff to proceed to collect said excise tax, interest, penalties and costs by levying the same on any property, goods or effects of such plaintiffs and the said Sheriff threatens to and will levy said warrants on the property of such plaintiffs in Osage County, Oklahoma, and proceed to sell the same in accordance with the mandates of said warrants and remit the proceeds of such property to the Oklahoma Tax Commission in satisfaction of said illegal tax, penalties, costs and expenses, unless restrained by the orders of this Honorable Court from so doing. And unless the property to be seized and sold, on sale produces an amount sufficient to pay the amount of any such warrant, the Oklahoma Tax Commission will issue alias warrants for the collection of such tax, interest, penalties, and costs, [fol. 16] until the same is collected. And will continue to

issue like tax warrants directed to the Sheriff of Osage County, or to the sheriffs of other counties in the State of Oklahoma in which plaintiffs have property, for the collection of such tax, interest and penalties at each succeeding time under said Act imposing such tax, the tax thereby imposed is payable. And said Tax Commission, as plaintiffs are informed and believe, and therefore state the fact to be, will, even if plaintiffs pay such tax under protest and bring suits to recover the same (which plaintiffs do not believe they have the right to do), not await the final determination of such suits before issuing other tax warrants for the collection of such tax, but will, notwithstanding the pendency of any suit, proceed at the expiration of every monthly payment period prescribed in said Act to issue tax warrants and plaintiffs will, if not given relief here, be subject to the annoyance, inconvenience and expense of a multiplicity of suits for the purpose of having said tax declared void and its exaction unlawful, and said Oklahoma Tax Commission will proceed to issue such succeeding tax warrants as hereinabove stated unless prohibited by the order of this Honorable Court from so doing. On the issuance of the tax warrants to R. B. Connor, as Sheriff of Osage County, Oklahoma, as hereinbefore stated, and on the issue of each succeeding warrant for the collection of the excise tax imposed by said Act, such warrant becomes and is an apparent lien on all the property in the State of Oklahoma of the plaintiff against whom the warrant is issued and casts an apparent cloud upon the title of all of such plaintiff's property which depreciates and impairs its value, the title thereto, and the enjoyment, use and disposition thereof and unless the defendants herein are enjoined and restrained from executing the tax warrants already issued and from issuing subsequent tax warrants plaintiffs will suffer irreparable damage and injury, will be powerless to protect themselves against recurrent acts of the defendants seeking to collect such excise tax, and for the redress of such wrongs and injuries and for the establishment of its right to produce oil in the Osage Nation, free from the taxing power of the State of Oklahoma except as authorized by Congress, plaintiffs are without any adequate remedy in the courts of Oklahoma, except that sought in this action.

[fol. 17] 5. Said Act of April 10, 1933, does not provide

any remedy by which the tax required to be paid by plaintiffs on their said production in the Osage Nation can be paid under protest and recovered if such tax should be declared illegal, nor does Chapter 66, Article 5 of the Session Laws of 1931, referred to in said Act of April 10, 1933, furnish any remedy or action by which the legality or illegality of said tax, when attempted to be levied on oil produced from the Osage leases, can be tested and determined and the tax, if paid under protest, recovered, and the general laws of the State of Oklahoma in regard to the payment of taxes under protest and the recovery thereof furnish complainant no speedy and adequate remedy at law in that such law does not apply to the tax herein sought to be enjoined and even if complainant be adjudged to have a remedy under said general law, such law is wholly inadequate to give complainant a speedy and adequate remedy, for, under the provisions of such law, the illegality of the tax can only be tested by the payment of the tax and bringing a suit for the recovery thereof where the illegality of the tax is alleged to arise by reason of some action for which the law provides no appeal and the illegality of the tax imposed by said Act and sought to be enforced does not arise or spring from, nor is it connected with the fact that no appeal is allowed from the imposition, enforcement or collection of said tax, but the illegality of such tax is founded on the fact of the want of competence of the State of Oklahoma to levy said tax and the provisions of said general taxing law are expressly limited to the taxes therein set out and so cannot apply to the tax attempted to be levied by the Act of April 10, 1933, but if such general taxing law does extend to and cover said excise tax, the remedy provided by said law is wholly insufficient and inadequate in this, that it wholly fails to provide for the recovery of any interest on the amount of said tax pending the litigation and does not provide what shall be done with the tax deposited under the terms thereof after the determination of the suit brought for the recovery of the tax, but said law merely provides that the auditor shall retain the tax paid under protest, and for the recovery of which a suit is authorized, as a special deposit to await the final determination of such suit, but fails to provide whether the [fol. 18] State Auditor upon the termination of said suit shall pay the deposit to the aggrieved taxpayer, and does

not provide, in event of the failure of such payment, whether suit to enforce the payment thereof shall or can be brought against the State Auditor or person holding said special deposit, one or both, and it does not provide what the State Auditor shall do with the tax in event he goes out of office, pending the final result of such litigation, nor does it provide how said deposit shall be handled in event the State Auditor receiving said tax and holding the same as a special deposit, should die, or be removed from his office, pending the final determination of the litigation in regard thereto, and does not provide whether said tax shall be held as a special deposit in the custody of the State Auditor or whether the same shall be deposited and held as a special deposit in a bank or whether the same shall be deposited in the State Treasury, and there is no provision as above stated in said general tax law for the payment of interest on the tax so illegally exacted, nor any means by which the money paid under protest in discharge of said tax can be lent or employed so as to produce money from which said interest could be paid.

6. In accordance with requirements of the Enabling Act, the State of Oklahoma by Section 3, of Article 1, of its Constitution, in said Constitution agreed and declared that the people inhabiting said State disclaimed all and any right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian Tribe or Nation, and that until the title to any such public land shall have been extinguished by the United States, the same shall remain subject to the jurisdiction, disposal, and control of the United States. And by reason of such provision of the Constitution, the State of Oklahoma and its Legislature were without jurisdiction, power or authority to pass any Act, and especially said Act of April 10, 1933, imposing and levying the tax hereinabove mentioned on the production of oil, insofar as said Act attempts to levy said tax on the oil produced in the Osage Nation and the attempt of the Oklahoma Tax Commission and the members thereof to enforce the provisions of said Act in collecting or attempt-
[fol. 19] ing to collect the tax levied thereby on production of oil in the Osage Nation, while constituting an apparent lien on the property of plaintiffs, such Acts are wholly without force and effect and are void both under the Con-

stitution of the State of Oklahoma and under the laws and Constitution of the United States. And plaintiffs, in regard to the attempted levy and enforcement of such tax upon them and their property, hereby offer to do equity and to do and perform any act or acts, which it is finally determined they should do and perform.

7. That the Act of April 10, 1933, levies a tax for a State purpose in that said tax is levied and appropriated to the expense of the administration of the proration laws of the State of Oklahoma and is to be collected by, paid to and paid out by the officers of the State of Oklahoma in the discharge of the official duties under the laws of the State of Oklahoma, and is to constitute compensation of officers for the discharge of official duties under the laws of the State of Oklahoma, and said Act of April 10, 1933, imposes an illegal tax, charge and assessment levied for State purposes insofar as the same is sought to be applied to leases in the Osage Nation, now Osage County, Oklahoma, and that therefore this Court has original jurisdiction of this action to enjoin the enforcement of said Act insofar as the same applies to oil produced from such leases and to enjoin the collection of such tax as levied and sought to be collected upon Osage leases. That there are a large number of persons other than these plaintiffs who are affected by the attempted enforcement of said Act as to Osage oil leases; that the said Tax Commission and the members thereof, and the Sheriff of Osage County are officers charged with the duty under said Act of April 10, 1933, of enforcing and collecting the tax levied thereby.

Wherefore, plaintiffs pray that a temporary injunction prohibiting and restraining the Oklahoma Tax Commission, Melvin Cornish, John T. Bailey, and W. D. Humphrey, as members thereof, from enforcing or trying to enforce against these plaintiffs any of the provisions of the said Oklahoma Excise Tax Law so as to interfere with the right of plaintiffs to produce oil from their oil leases in the Osage Nation without being liable to the tax levied by said Act on the production of such oil and be prohibited and [fol. 20] restrained from requiring or attempting to require plaintiffs to make any report under said Excise Tax law of their production of oil in the Osage Nation or to report and pay the tax attempted to be levied by said Act

and be further prohibited and restrained from assessing or attempting to assess against plaintiffs any of the interest, penalties, or costs provided in said Act for failure to make the reports or to pay the tax required thereby insofar as such failure to make such reports and pay such tax is confined to production from oil leases in the Osage Nation, and that the said Oklahoma Tax Commission, Melvin Cornish, John T. Bailey and W. D. Humphrey, as members thereof, be further restrained, prohibited and enjoined from issuing or attempting to issue tax warrants to the Sheriff of any County in the State of Oklahoma in which plaintiffs have property, commanding such Sheriff to collect or, failing to collect, to levy tax warrants on the property of plaintiffs in order to collect such tax, insofar as the tax levied by said Act is sought to be applied to the production of oil on and from oil leases in the Osage Nation, and that the defendant, R. B. Connor, as Sheriff of Osage County, be prohibited and enjoined from levying or attempting to levy the tax warrants heretofore issued by said Tax Commission to him as said Sheriff for the collection of said Excise Tax on the production from oil leases in Osage Nation and from taking possession of or attempting to take possession of any of the property of any of the plaintiffs under said tax warrants or attempting to enforce or execute said tax warrants in any manner or form against any of the plaintiffs or the property of any of the plaintiffs and that said temporary injunction remain and be in force until the final hearing and disposition of this cause unless the same be sooner set aside, changed and modified by the orders of this Court and on the final hearing hereof said temporary injunction be made final and permanently prohibit and restrain the Oklahoma Tax Commission, and the above named members thereof, from enforcing or attempting to enforce any of the provisions of the Oklahoma Excise Tax Law as against these plaintiffs as said law is applied or attempted to be applied to the production of oil from leases upon lands in the Osage Nation so long as the consent of the United States to the levy of said tax by the State of Oklahoma is not given and that said statute, inso-
[fol. 21] far as the same is construed and interpreted as applying to the production of oil from oil leases in the Osage Nation, to be declared, adjudged and decreed, void and of no force and effect and the said defendant R. B.

Connor, be enjoined and restrained from executing or attempting to execute any tax warrant now or hereafter to be issued by the said Oklahoma Tax Commission and directed to him as Sheriff of Osage County to collect such Excise Tax attempted to be levied on oil produced from the Osage Nation unless the said United States shall have given its consent to the imposition of such Excise Tax.

Plaintiffs further pray that on the final hearing of this cause that said Act of April 10, 1933, be declared void and of no force and effect insofar as the same applies to, or is attempted to be applied to, oil producing leases in the Osage Nation and that on the final hearing hereof that said Tax Commission, the members thereof, and its successors in office, and the said R. B. Connor, as Sheriff of Osage County, and his successors in office, be forever enjoined from enforcing or attempting to enforce said Act, or issuing or attempting to issue and from executing or attempting to execute any tax warrants, for the collection of the tax imposed by said Act insofar as oil produced in the Osage Nation is concerned, until and unless the consent of the United States to the imposition of said tax has been given by Act of Congress.

Plaintiffs further pray that all other parties similarly situated as plaintiffs may come in and become parties hereto on making application to the Court so to do.

Plaintiffs further pray for such other, further or more general relief which the Court in equity and good conscience may deem they are entitled to.

James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs.

[fol. 22] *Duly sworn to by L. G. Owen, Jurat omitted in printing.*

[fol. 23] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION FOR ORDER CORRECTING TITLE OF DEFENDANTS' ANSWER—Filed April 29, 1935

Come now the defendants in the above entitled and numbered cause and show the Court that heretofore, towit, on

the 21st day of November, 1933, an order was entered in said cause assuming original jurisdiction on the plaintiffs' petition and directing the defendants to file brief in response thereto. Defendants in compliance with the order of the Court filed their answer and brief to plaintiffs' petition and brief, but the pleading was inadvertently styled "Answer Brief of Defendants" and it should have been styled "Answer to Plaintiffs' Petition and Brief." The pleading was treated by the Court and the plaintiffs and defendants as an answer to plaintiffs' petition and brief.

The defendants, therefore, move the Court to reform and correct the said pleading, in the matter of its title, to read "Answer to plaintiffs' petition and Brief."

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Oklahoma Tax Commission.

Copies hereof mailed to opposing counsel, L. G. Owen, Tulsa, Okla., M. D. Kirk, Tulsa, Okla.

[fols. 24 & 25] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING TITLE OF DEFENDANTS' ANSWER—Filed April 29, 1935

Application having been made to reform the title of pleading filed in the above case entitled "Answer Brief of Defendants" to read "Answer to Plaintiffs' Petition and Brief", permission to reform and correct such pleading is hereby granted and, it is ordered that defendants' pleading be considered as if the title so read.

Edwin R. McNeill, Chief Justice.

[fol. 26] [File endorsement omitted.]

[Title omitted]

ANSWER BRIEF OF DEFENDANTS—Filed Jan. 8, 1934

Plaintiffs by their petition in this court seek to prohibit the Oklahoma Tax Commission and the Sheriff of Osage

County, Oklahoma, from collecting the one-eighth of one cent per barrel tax levied upon the production of oil and gas in this State insofar as it applies to the production thereof on Osage Indian lands. The tax is levied by sec. 1, c. 132, S. L. 1933, page 302, which provides:

"Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; [fol. 27] provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."

The purpose for which the tax is levied is set forth in sec. 2 of the Act, which provides:

"All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oli produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the 'Proration Fund.' All moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Attorneys, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts

of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the 'Proration Fund' hereby created."

Plaintiffs contend that the tax imposed by the Act is an excise tax, and is a tax upon a governmental instrumentality and not permitted by the Act of March 3, 1921, 41 Stats. at L. 1250. Sec. 5 of the Act provides:

[fol. 28] "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: Provided, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: Provided further, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

It is our contention that the tax levied by the State under the provisions of the Act above mentioned is an additional gross production tax, and is, therefore, authorized by the

Act of Congress above quoted. It will be noticed that the Act of Congress provides that the State of Oklahoma is authorized from and after the passage thereof to levy and collect a gross production tax on all oil and gas produced in Osage County, Oklahoma. The amount of the tax authorized to be levied thereunder is not limited. The only limitation or qualification provided by the Act is that "all taxes so collected shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil or gas as provided by the laws of Oklahoma". The tax levied is a gross production tax, and the Act of the Legislature authorizing the same is, therefore, permitted by the Act of Congress above quoted.

The mere fact that the Legislature in adopting the Act [fol.29] designated the tax in question an excise tax is not controlling. In determining the nature of the tax, the courts look to the intention and purpose of the Legislature in enacting the law levying the tax, and upon the practical effect and operation of the tax so imposed. In the case of St. Louis, Southern R. Co. v. State of Arkansas, 235 U. S. 350, the Court said:

"In determining the nature of a state tax and constitutionality of the statute imposing it, this court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced."

In the case of Shaffer v. Carter, State Auditor, 252 U. S. 37, the Court in discussing the question here involved, said:

"It is insisted, however, both by appellant in this case and by the opponents of the New York law in Travis v. Yale & Towne Mfg. Co., that an income tax is in its nature a personal tax, or a 'subjective tax imposing personal liability upon the recipient of the income;' and that as to a non-resident the State has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical opera-

tion and effect of the tax imposed. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 362; Mountain Timber Co. v. Washington, 243 U. S. 219, 237; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463."

[fol. 30] The tax in question was levied for the purpose of raising funds to enforce the proration law relating to petroleum and natural gas produced in this State, which law was enacted to prevent waste, and to protect the oil industry of the State, and was enacted for the benefit of plaintiffs as well as other companies producing oil and gas in the State. No ad valorem tax is levied against the property of plaintiffs, and the tax of one-eighth of one cent levied by the Act for the purpose of paying the expenses incident to the enforcement of the proration law together with the three per cent theretofore levied under General Law, sec. 12434, O. S. 1931, must be taken into consideration and construed together as a single Act levying a gross production tax which is in lieu of ad valorem taxes upon such production. The tax in question is not an excise tax, but is, in truth and in fact, a tax in the nature and in lieu of a property tax.

It will be observed that the Act levying the tax in question provides that the tax so levied shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law for the collection of gross production tax on petroleum oil, and if the Legislature in enacting the law had designated the tax a gross production tax instead of an excise tax, in our opinion it would not then have been contended that the Act was invalid and not authorized by the Act of Congress above mentioned. The mere fact, however, that the tax in question is designated an excise tax by the Legislature can not change the effect of the tax or the purpose for which the law was enacted, and the tax levied. The Court should construe the Act in question as levying a gross production [fols. 31 & 32] tax. The writ should be denied.

Respectfully submitted. J. Berry King, Attorney General, by F. M. Dudley, Assistant Attorney General; C. W. King, Attorney for Oklahoma Tax Commission; A. L. Herr, Attorney for Defendants.

[fol. 33] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 25,181

BARNSDALL REFINERIES, INC. et al., Plaintiffs in Error,

vs.

OKLAHOMA TAX COMMISSION, MELVIN CORNISH, JOHN T. BAILEY, and W. D. HUMPHREY, as Chairman and Members of said Commission, and R. B. CONNOR, as Sheriff of Osage County, Oklahoma, Defendants in Error.

SYLLABUS

1. The excise tax of one-eighth of one cent per barrel on oil levied by Chapter 132, S. L. 1933, when applied to oil produced from lands of the Osage Indian Tribe in Osage county, Oklahoma, by lessees operating under leases executed by and with the approval of the Secretary of the Interior of the United States, is an unauthorized State tax on a Federal governmental agency or instrumentality, and is beyond the authority of the State.

Original action to enjoin the Oklahoma Tax Commission and the Sheriff of Osage County from collecting an excise tax of one-eighth of one cent per barrel on oil produced from lands of the Osage Tribe of Indians.

Injunction granted.

James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs; C. W. King, A. L. Herr, Attorneys for Defendants.

[fol. 34] OPINION—Filed Feb. 19, 1935

WELCH, J.: The plaintiffs, holding governmental leases properly executed by and with the approval of the Secretary of the Interior of the United States, are producing crude oil from the lands of the Osage Tribe of Indians in Osage County, Oklahoma. They seek to enjoin collection of the tax sought to be collected on such oil pursuant to the provisions of Chapter 132, S. L. 1933. The contention of the plaintiffs is that the leases held by them are instrumentalities employed by the United States Government for the

development and use of Osage lands for the benefit of the Osage Tribe of Indians, and are governmental agencies or instrumentalities; that no tax thereon may be imposed by the State of Oklahoma without the consent of the United States Government; that the tax in question is an excise tax; that no consent has been given by the United States Government to the levy and collection of such tax; and that therefore such tax may not be levied and collected on such oil produced from Osage lands.

The defendants maintain that the tax in question is an additional gross production tax, and is therefore authorized by the Act of Congress of March 3, 1921, 41 Stats. at Large, 1250, which Act authorizes the State of Oklahoma to levy and collect a gross production tax on oil and gas produced in Osage County, Oklahoma.

It is now beyond question that the oil leases held by the plaintiffs are governmental instrumentalities, and that the State of Oklahoma may not impose any tax thereon without the consent of the United States Government. Carter Oil Company v. Oklahoma Tax Commission 166 Okla. 1, 25 Pac. (2d) 1092; Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779; Howard v. Oil Companies, 247 U. S. 503, 62 L. ed. 1239; Large Oil Co. v. Howard, 248 U. S. 549, 63 L. ed. 416; Gillispie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338; Jaybird Mining Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112. And it seems to [fol. 35] be conceded by the defendants that this tax could not be levied and collected without the consent of the United States Government.

In 1916 the State Legislature adopted the gross production tax law carried forward as section 12,434, O. S. 1931, providing in substance for the collection of a gross production tax equal to three percentum of the gross value of the production of oil and gas, with provision in the act (Sec. 12445 O. S. 1931) for the expenditure of the funds realized from that tax for current expenses of the State Government, in aid of common schools of the county where the oil and gas is produced, and in aid of the construction of permanent roads and bridges of the county where the oil and gas is produced.

It was then held by the courts (see above authorities) that this tax could not be collected on oil produced from

the Osage Indian lands for lack of consent thereto on the part of the United States Government.

Thereafter, on March 3, 1921, the Congress adopted a permissive Act (41 Stats. at Large, 1250) providing as follows:

"Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalities from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: Provided further, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

Since that Act of Congress became effective the State has collected upon oil produced in Osage County, Oklahoma, the gross production tax provided for in section 12434, O. S. 1931.

In 1933 the State Legislature adopted House Bill #481, Chapter 131, S. L. 1933, referred to as the "Proration Law" and having for its purpose the prevention of waste of crude petroleum and natural gas, and providing in partial substance that whenever the full production of any common source of supply of oil in this state can only be obtained under conditions constituting waste, then any [fol. 36] person having the right to drill into and produce oil from any such common source of supply should only take

therefrom such proportion, or his proper portion of the oil, that may be produced therefrom without waste. This act created the official machinery for its enforcement, and provided for the appointment of various salaried officials, and authorized the expense incident to the many details of the enforcement of the law in these regards. The same Legislature adopted House Bill No. 483, Chapter 132, O. S. 1931, entitled "An Act levying an Excise Tax of ⅛th of 1 per cent per barrel on petroleum oil produced in the State of Oklahoma, subsequent to the passage and approval of this act," and the body of the Act levied such an excise tax, and provided for its collection, and provided in substance that the funds derived from the levy and collection of that tax should be deposited in the State Treasury to the credit of a special and distinct fund to be known as "The Proration Fund," and to be expended for salaries, supplies and expenses as fixed and authorized by the provisions of House Bill #481, the "Proration Law" above referred to.

Under the provisions of this Act this tax is levied only for the period of time from the effective date of the Act in 1933, to June 30, 1935. It is that tax of ⅛th of one cent per barrel on oil that is here under consideration.

In considering this cause, and at the outset, we are met with the question whether this tax of ⅛th of one cent per barrel is or is not an "Excise Tax." It was denominated an "Excise Tax" by the Legislature in the body of the Act levying the tax, and in the title thereto, and while the designation of a tax is not necessarily controlling as to what is the nature and character of the tax, yet this tax is not in any manner based upon the value of the oil taxed, applying alike to the most valuable barrel of oil as to the least valuable barrel. This tax is small in amount, and to exist for a limited time only, and for the benefit of a special fund or purpose as distinguished from a general purpose. It therefore bears all the earmarks of an excise tax as distinguished from a property tax, and we conclude that it is in truth and in fact what the Legislature designated it to be, that is, an "Excise Tax." Patton v. Brady, 184 U. S. 608, 46 Law ed. 713; Flint v. Stone Tracy Co. 220 U. S. 107, 55 Law. ed. 389.

[fol. 37] But it is the contention of the defendants that whether this tax is determined to be an excise tax or not,

that it is levied upon the gross production of oil, and is but an additional gross production tax, and within the permissive Act of Congress above referred to.

Having concluded that this tax is an excise tax, and it not being contended that there is any specific consent to the levy and collection of an excise tax, we must determine whether this tax is consented to by the Act of Congress of March 3rd, 1921, consenting to the levy and collection of a state gross production tax.

Since the adoption of the legislative act of 1916, the three per centum tax thereunder levied and collected has been commonly known and referred to as the "gross production tax." That act provides specifically that the tax therein levied shall and should be "in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts, and other municipalities, upon any property rights attached to or inherent in the right to said minerals, leases, etc." That act also provided that the funds collected should be distributed and expended for the three purposes heretofore stated.

This one-eighth of one cent tax is levied on each barrel of oil without regard to the value of the oil taxed. It is not a per centum tax as is the gross production tax. The money collected for gross production tax is distributed two-thirds for current expense of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or required to be expended in the county where the oil is produced, but on the contrary, this money goes into the "proration fund" and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration, and the different method of dis-
[fol. 38] tribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in

the language above quoted from the Congressional Act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters hereunder consideration, the duty, purpose and policy of the United States Government was to look after and provide for the general well being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage County, Oklahoma, by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage county. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this act, however beneficial to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians. The Congress might or might not consent to the levy and collection of this excise tax.

Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The State of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. Burnett v. Coronada Oil & Gas Co. 285 U. S. 393, 76 Law ed. 815.

[fol. 39] Our state should freely act in the levy and collection of a tax on national governmental instrumentalities, which is consented to by the National Government, but we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or the

consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax. Under the permissive Act of Congress we have levied and collected the gross production tax which was authorized and permitted, and further than that we cannot go with other taxes until and unless that government should itself extend the consent and permission heretofore granted. That governmental consent cannot be extended or enlarged upon by the State Legislature, and should not be by this court.

We conclude that the tax of one-eighth of one cent per barrel levied by Chapter 132, S. L. 1933, is an excise tax and not an additional gross production tax; that this excise tax is levied upon governmental agencies when it is sought to be applied to oil produced from the lands of the Osage Indian Tribe under the leases held by the plaintiff; that it cannot be so applied without the consent of the National Government, and that this consent has not been given. It therefore follows that such collection of this tax must be enjoined, and in keeping with the prayer of the plaintiffs' petition the defendant, The Oklahoma Tax Commission, and Melvin Cornish, John T. Bailey and W. D. Humphrey, as Chairman and Members of said Commission, and R. B. Connor, as Sheriff of Osage County, Oklahoma, are hereby enjoined from collecting this excise tax of one-eighth of one cent per barrel on any and all oil produced from the lands of the Osage Tribe of Indians situate in Osage County, Oklahoma, until and unless the consent of the United States Government for the imposition of such tax shall be given.

McNeill, C. J., and Bayless, Phelps and Gibson, JJ., concur.

Osborn, V. C. J., and Riley, Busby and Corn, JJ., dissent.

[fol. 40] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING OPINION—Filed March 13, 1935

It is hereby ordered that the opinion in the above styled and numbered cause filed February 19, 1935, be corrected

as to the name of Mr. Owen, one of the attorneys for the plaintiff, to show his initials to be "*L. G.*" instead of "*N. G.*" as erroneously written.

Edwin R. McNeill, Chief Justice.

[fol. 41] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

DISSENTING OPINION—Filed Feb. 19, 1935

OSBORN, V. C. J. (Dissenting):

As I view it the majority opinion has placed a strained and technical construction upon the Act of Congress involved herein, and does not give due consideration to the spirit, purpose and intent thereof.

By virtue of the decisions quoted in the majority opinion and prior to the permissive Act of Congress (Act Mar. 3, 1921, 41 Stats. At Large 1250) oil operators had escaped all taxation on oil and gas produced from certain Indian lands on the theory that as such operators they constituted Federal Agencies. The State was therefore powerless to claim any revenue whatever for the support of its governmental functions from this natural resource which was rapidly becoming exhausted. The preferment of an oil operator who produced oil from Indian lands over another operator who produced oil from other lands is not sustained by the principles of common justice. To remedy the unfair situation so created the permissive Act of Congress was passed.

The Act specifically grants authority to the State of Oklahoma to levy a gross production tax on all oil and gas produced in Osage County. It is significant that the maximum or minimum tax is not prescribed by the Act. Thus there is manifested a clear intent that the oil and gas produced in Osage County should be taxed on the same basis as oil and gas produced on other lands within the State.

A helpful rule of construction relating to a similar problem involving taxation is announced by the Supreme Court of the United States in the case of Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 455, wherein it is said:

[fol. 42] "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed. St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362; S. 35 S. Ct. 99, 59 L. Ed. 265; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Crew Levick Co. v. Pennsylvania, 245 U. S. 294, 38 S. Ct. 126, 62 L. Ed. 295; American Mfg. Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084."

Pursuing the above policy of construction it is apparent that it is immaterial whether the tax involved herein is called an excise tax, a property tax, or a gross production tax. We cannot escape the conclusion that it is a tax on the gross production of oil.

Two reasons are assigned in the majority opinion as to why the tax does not come within the permissive Act of Congress. The first relates to the manner of levy in which it is pointed out that the gross production tax is based on the gross value of oil produced, while the tax involved herein is fixed at a flat rate per barrel of oil. I fail to perceive any manner in which this distinction relates to the practical operation and effect of the tax imposed. The distinction is purely technical and is not justified by the manifest object and purpose of Congress in the enactment of the permissive statute.

It is also pointed out in the majority opinion that the manner of distribution of the gross production tax differs from the manner of distribution of the tax involved herein. An examination of the permissive Act of Congress discloses that the Act does not directly or impliedly provide for the manner in which the tax levied by virtue thereof is to be distributed. On the other hand the Act specifically provides that the tax is to be distributed "as provided by the laws of Oklahoma." It must have been contemplated that there was a possibility that the law providing for the distribution of the gross production tax might be changed or amended and no one would contend that such a change or amendment would invalidate the permissive Act of Con-

gress and result in a withdrawal of said permission to levy and collect such tax. In my judgment it is not within the province of Congress to provide for the manner of distribution or a general tax levy as this is one of the powers vested in a sovereign state.

No complaint is made as to the justice of the tax. The [fols. 43 & 44] benefits flowing from the enforcement of the proration laws apply to all oil operators alike. I do not believe that it was the intention of Congress that operators on Indian lands should profit at the expense of other operators. This identical question was presented to the Federal Court of the Northern District of Oklahoma in the case of Gypsy Oil Co. v. Oklahoma Tax Commission, 6 Fed. Supp. 6. The cause was heard by three Judges. Although the case was decided on a jurisdictional issue the judges announced their respective opinions relating to the validity of the tax. Judges McDermott and Kennedy were of the opinion that the tax levied by Chapter 132, Session Laws 1933, was within the permissive Act of Congress, and Judge Kennamer entertained the opposite view. In my judgment the majority opinion was correct.

But I want to register a most vigorous dissent to some of the reasoning in the majority opinion. It is not for this, or any other court, to speculate upon the motives that actuated Congress to grant the right of taxation on this governmental agency; it is for this court to construe the language of the Act conferring such right. I especially dissent to the expressed theory of the majority opinion set forth therein: "But we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax." This is in conflict with the universal rule that the power of taxation is always construed liberally in favor of the sovereign and a claim of exemption from taxation is construed strictly as against one claiming lact of power to levy. I am unable to perceive a distinction in basic effect from a tax that exacts a per centum of the gross value of a barrel of oil and a fixed tax of a fraction of a cent per barrel.

I therefore respectfully dissent. I am authorized to say that Mr. Justice Busby concurs in this dissenting view.

[fol. 45] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT —Filed March 4, 1935

Come now the defendants in error, Oklahoma Tax Commission, H. L. McCracken, Raymond D. Thomas, and E. L. Richardson, comprising the membership thereof, successors in office to the above named defendants, Melvin Cornish, John T. Bailey, and W. D. Humphrey, former members of said Oklahoma Tax Commission, as shown by order of substitution entered in the above entitled and numbered cause, and R. B. Connor, as sheriff of Osage County, Oklahoma, and show to the Court that heretofore, to-wit: on the 19th day of February, 1935, this Court rendered its order, judgment, and decree against the above named defendants and in favor of the plaintiffs, Barnsdall Refineries, Inc., et al., in which said judgment, order and decree the said Court held invalid Chapter 132, Session Laws 1933, as applied to oil produced from lands of the Osage Indian Tribe in Osage County, Oklahoma, operated under leases executed by and with the approval of the Secretary of the Interior of the United States, as an unauthorized effort of the State of Oklahoma to levy a tax on a federal governmental agency or instrumentality, and, therefore, being beyond the authority and power of the State of Oklahoma; which said judgment, order, and decree permanently enjoined the defendants, officers of the State of Oklahoma, from collecting the 1/8th of one cent per barrel tax upon the production derived from the above described leases until and unless the consent of the United States Government for the imposition of such tax shall have been given.

That said judgment is erroneous and deprives the State of Oklahoma of the benefits of said Act and the tax imposed thereby, in that said judgment and decree erroneously and [fol. 46] unlawfully holds said act to be outside of and beyond the power of the State of Oklahoma, on the ground that the collection of such tax is an unlawful impingement upon a federal governmental agency or instrumentality, when in truth and in fact said tax is wholly within the scope

of the power of the defendants authorized by valid acts of Congress, to-wit: Section 5, of the Act of Congress of March 3, 1921, 41 Stats. 1250. The said Act of Congress had for its purpose and intent the authorization to the State of Oklahoma to levy any and all taxes upon the gross production of oil and gas derived from Osage leases of the characted involved in this litigation, regardless of the name or designation of such tax, so long and insofar as such tax was uniform with the taxes levied on like production from oil and gas throughout the State of Oklahoma.

If the State of Oklahoma wish to lower the gross production tax, raise the same, or substitute an excise or any other form of taxation on production, and abandon entirely the present gross production tax, so-called, the new tax would be valid as within the terms of the Act of Congress. That being true, then they could add to the present gross production tax any increase thereof under the name of any other tax desired, so long as it applied alike to a tax on all production. The authorization couched in the authority "to levy and collect a gross production tax upon oil and gas" is all-embracive as is shown by the following language: "and all such taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas *as provided by the laws of Oklahoma.*"

In other words, it was not the intention of Congress to restrict for time and eternity the legislative powers of the State of Oklahoma as to its selection of subjects of taxation and the forms thereof. The Constitution of the State of Oklahoma in Section 12, Article 10, authorized the Legislature to levy any number of forms of taxation therein enumerated, several of which could easily be applied to oil and gas production, to-wit: gross revenue, excise, income, graduated income, and "production," and any one of which would come within the provisions of the permissive Act of Congress, because any such tax would be a tax upon the gross production of oil and gas, and would conform to the intent of Congress to permit the State to levy what-[fol. 47] ever tax upon that subject matter, to-wit: gross production of oil and gas, which such State under its laws levied upon like production or non-restricted production.

The Court's attention is directed to that portion of the opinion which defines the tax as an excise tax, and says

that the Legislature went beyond the terms of the permissive Act of Cnogress when it undertook to levy the tax of that nature, to-wit: "excise," as distinguished from gross production. The Court overlooked the proposition that the gross production has reference solely to the subject matter, or corpus, to which the tax, or any tax the Legislature sees fit to enact applies, and has no reference to a circumscribing or restriction or limitation of the legislative function of the State in designating its form of tax. Congress will not be so preemptive, and if so would not have the power to invade the sovereign right of the State to denominate its subjects of taxation and prescribe the form of such taxation. If any other view were taken and the State sought to change its method of taxation by substituting for all other taxes a gross receipts tax, as some states have done, instead of a production tax and other forms of taxation, the opinion as written would immunize and exempt all production from restricted production heretofore authorized by Congress.

It would be interesting to the Court perhaps to recall the remark of Judge McDermott, when the three-judge court passed upon this same question sustaining the position of the State of Oklahoma, when he said: "The fact that it is denominated as an excise tax makes no difference, because it has been my experience that whenever a Legislature wants to enact a new tax and does not know what to call it, they invariably designate it as an excise tax, and after years of experience in passing on tax cases, I do not know what an excise tax is, and I don't think anybody else does."

It was the concurrence of opinion of the federal judges in passing on this same case that so long as the tax was on production and applied alike to all production in the State of Oklahoma, it was immaterial what name the Legislature sought to give the tax.

[fol. 48] It is unthinkable that Congress would permit the State of Oklahoma to enact taxes on gross production of oil and gas that would be so restrictive as to prevent the State from meeting the situations as they arise so that any new tax legislation affecting the entire industry in the State of Oklahoma would not appply to the production from restricted leases, for the reason that, as in the instant case, legislation passes for the benefit of the industry itself

to raise the price and insure a better regulation, is as beneficial and as much to the interest of the producers from restricted production as the others.

Referring more specifically to the three-judge opinion in which this identical question was passed and decided, and which is not even mentioned in this Court's opinion, we quote the following: "And the writer (Judge McDermott) agrees with Judge Kennedy that whatever the character of the tax assailed—whether it is an escise tax or a property tax—it is a tax on gross production of oil within the permissive Act of Congress." * * * Quoting from the concurring opinion of Judge Kennedy, we find the following: "Adverting to the merits, the claim is made by the plaintiff that the tax in question is an excise tax and not a property tax, and therefore not within the permissive Act of Congress, quoted in the opinion of Judge McDermott. It will be noted that there is no specified limitation to the gross production tax there permitted. It is immaterial in the practical construction of the Act of Congress what the tax here may be called. In its nature it is the same type of tax which the State of Oklahoma has already levied on gross production upon the basis of value, (admittedly valid as coming within the permissive Act). Under the challenged law attempt is made to levy a gross production tax upon the basis of volume. There is no distinguishable difference between the two. Both are within the scope of the permissive Act, and I care not whether they may be denominated excise, gross production, or property taxes."

It is a cardinal rule of statutory construction that federal courts, wherever possible, will adopt the construction placed on state statutes by the state courts, and it is likewise a recognized principle of statutory construction that state courts will adopt the construction placed on federal statutes by the federal courts, and since the federal court has given the first construction of the permissive statute [fol. 49] under consideration favorable to a broader power of state taxation than is indicated by the state court opinion, it occurs to us that this court should follow the construction on such Act of Congress by the United States court. The federal court passing on this question was presided over by Circuit Judge McDermott, recognized to be among the very best lawyers and judges in the United States.

The far-reaching results of this case, aside from the taxes which have accrued or may accrue under the act in question, lie in the limitation the Supreme Court in this decision has placed upon the legislative power to levy taxes on oil. The present bills before the Legislature to allow minimum taxes on a barrelage basis and other legislation which the Legislature might in its wisdom determine to be within the sound policy of the State would be jeopardized by the opinion as written.

For the convenience of the Court, a copy of the three-judge federal court opinion in the case entitled Gypsy Oil Company vs. Oklahoma Tax Commission, et al., No. 925-Equity, is attached.

Wherefore, it is respectfully requested that this case be set down for oral argument, that time be given in which to file briefs, and that a rehearing be granted, and the decision heretofore rendered withdrawn, and the tax sustained.

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Oklahoma Tax Commission. Edwin Dabney, George W. Selinger, Attorneys for Proration Department of Corporation Commission of State of Oklahoma.

Copy of Petition for Rehearing has been sent to James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, and N. G. Owen, by depositing same in the United States mail, with sufficient postage thereon, properly addressed to each, this 4th day of March, 1935.

George W. Selinger.

[fol. 50] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed March 12, 1935

The Clerk is hereby directed to enter the following orders:

25,181—Barnsdall Refineries, Inc. v. Oklahoma Tax Commission, et al. Petition for rehearing and motion for oral

argument thereon, denied. Osborn, V. C. J., Riley, Busby and Corn, JJ., dissent.

Edwin R. McNeill, Chief Justice.

[File endorsement omitted.]

[fol. 51] [File endorsement omitted.]

In Supreme Court of Oklahoma

[Title omitted]

Order Substituting Parties Defendant—Filed March 6, 1935

Motion of the Defendants in Error having been filed herein showing that since the institution of the above entitled and numbered cause Melven Cornish, John T. Bailey and W. D. Humphrey, as chairman and members of the Oklahoma Tax Commission, have ceased to comprise such Commission, and that they have been succeeded by H. L. McCracken, Raymond D. Thomas and E. L. Richardson, as members of such Commission;

It is therefore ordered that said H. L. McCracken, Raymond D. Thomas and E. L. Richardson be, and they are hereby substituted parties defendant in error in said cause.

Dated this 5th day of March, 1935.

Edwin R. McNeill, Chief Justice.

[fol. 52] [File endorsement omitted.]

In Supreme Court of Oklahoma

[Title omitted]

Præcipe for Transcript of Record—Filed May 11, 1935

To the Clerk of the Supreme Court of the State of Oklahoma:

You will please prepare certified transcript in the above entitled and numbered cause, for review in the Supreme

Court of the United States of America by writ of certiorari from the final judgment rendered against the defendants in said cause on the 12th day of March, 1935.

You will include in said transcript the following:

1. Application of Plaintiffs for Permission to file original suit, and order granting permission;

2. Petition of Plaintiffs;

3. Answer of Defendants;

4. Opinion and judgment of the Court;

5. Dissenting Opinion;

6. Petition for rehearing;

7. Order overruling petition for rehearing;

8. Order substituting parties defendant;

9. Præcipe for transcript.

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Defendants.

[fol. 53] Due service and receipt of a copy of the within præcipe is hereby acknowledged this 7th day of May, 1935.

Edward H. Chandler, James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.